Counsel has submitted that this was a misdirection or non-direction on the burden of proof. In our view it has nothing to do with the burden of proof. Section 86(ii) of the Penal Code requires evidence of intoxication to be taken into account in the consideration of the question of intent. The passage just referred to required the jury to consider the evidence of intoxication before the court. They were told that if, on the evidence, they were satisfied that the appellant was so drunk as to be incapable of forming the necessary intent to kill they should return a verdict of culpable homicide not amounting to murder. That was a direction on the law. Elsewhere the jury had been told the comparative extent to which they have to be satisfied in relation to the prosecution case and in relation to the case for the defence. They have been told that if they entertained any reasonable doubt the benefit of such doubt should be given to the accused. We cannot find any substance in this complaint.

The objection against hearsay evidence was not seriously pressed as counsel was not sure if he was on strong ground. We have considered the objection and have come to the conclusion that even if there was any misreception of evidence it cannot materially affect the appellant's conviction.

Another ground of appeal is that the trial judge's comments on the appellant's decision to make an unsworn statement was a misdirection. The passage singled out as an instance reads as follows: —

"Now let us look at the defence. The accused chose to make a statement from the dock. It was within his legal rights to do so. It is not sworn evidence which can be cross-examined to and which will give the prosecution a chance of testing its credibility. Nevertheless, you can attach to it such weight as you think fit. You must take it into consideration in deciding whether the prosecution have made out their case so that there is no reasonable doubt."

We are unable to find anything in this passage which can amount to a misdirection. Unlike prosecuting counsel a trial judge is entitled to make such comment as he may think right and proper in the interest of justice but it must not exceed the limit of fair comment by suggesting, for instance, that the statement is not true or that the accused is a liar simply because he did not make a statement on oath. This ground of appeal also fails.

Under "miscellaneous" counsel has referred to various other passages in the summing up and criticised them on grounds similar to those which have already been considered. We are unable to find any valid ground for the criticisms.

We would conclude by saying that on the evidence before the trial court, as a whole, the appellant has been rightly convicted of murder. We uphold the conviction and confirm the sentence of death.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *S. K. Lee & Co.*

CHINA INSURANCE CO. LTD. v. NGAU AH KAU

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) September, 24, 1971]

[Alor Star — Federal Court Civil Appeal No. 106 of 1970]

Insurance — Motor — Repudiation of policy — False answers given in proposal form — Whether oral evidence can be given to contradict written evidence — Materiality of answers — Whether insurance agent helping to fill up proposal form agent of the insurer or the company.

Contract — Agreement in writing — Insurance policy — Questions and answers in — Whether made condition of policy.

Evidence — Admissibility — Oral evidence — Evidence Ordinance, 1950, ss. 91 and 92.

The plaintiff/respondent had claimed to be indemnified for the loss of his car. The defendant/appellant company did not dispute the theft but resisted the claim on the ground that the plaintiff in his proposal form had made a declaration false in several aspects. In answer to the questions whether he had made a claim under any motor vehicle policy he had said "no"; and in answer to the question whether he was or had been insured in respect of any other vehicle he gave the name of another insurance company. The plaintiff had in fact made a claim but this was more than three years prior to the proposal and he had said he had been advised by the agent that he need not disclose this. Also he left it to the agent to put in the name of the defendant in answer to the second question. The learned trial judge after hearing the evidence of the plaintiff and the agent held that the answers to the questions were not material. On appeal,

Held, allowing the appeal (Azmi L.P. and Ali F.J., Suffian F.J. dissenting): (1) the answers to the questions had become terms of the contract of insurance and by reason of sections 91 and 92 of the Evidence Ordinance it was not open to the plaintiff to adduce oral evidence to contradict, vary or add to or subtract from them;

(2) the truth of the answers had been made a condition of the policy and it was not open to the trial judge to consider the question whether the answers to these questions were material or not.

Cases referred to:

(1) *Zurich General Accident and Liability Insurance Co.* v. *Morrison & Ors.* [1942] 2 K.B. 53 at p. 60.

(2) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356; [1929] All E.R. Rep. 442.

(3) *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516.

(4) *Dawsons Ltd.* v. *Bonnin & Ors.* [1922] All E.R. Rep. 88.

(5) *Joel* v. *Law Union and Crown Insurance Co.* [1908] 2 K.B. 863.

(6) *Locker and Woolf Ltd.* v. *Western Australian Insurance Co.* [1936] 1 K.B. 408.

(7) *Condogianis* v. *Guardian Assurance Co. Ltd.* [1921] 2 A.C. 125, 129.

(8) *Glicksman* v. *Lancashire & General Assurance Co. Ltd.* [1926] All E.R. Rep. 161.

(9) *Barrett Brothers (Taxis) Ltd.* v. *Davies* [1966] 1 W.L.R. 1334.

(10) *Thomson* v. *Weems* (1884) 9 App. Cas. 671.

FEDERAL COURT.

Lim Kean Siew for the appellants.

O. L. Phipps (*Triptipal Singh* with him) for the respondent.

Cur. Adv. Vult.

Azmi L.P.: By a policy of motor insurance between them, the defendant company agreed to in-

sure the plaintiff's motor car No. PH. 2793 valued at $12,000 against damage or loss, *inter alia*, by theft, for the period between 2nd September 1967 and 1st September 1968. On 29th September 1967 the said motor car was stolen while it was parked by the plaintiff in Jalan Pantai, Butterworth. The plaintiff reported the loss the same day at the police station and duly notified the defendant company of the said loss, and claimed to be indemnified under the said policy but the defendant company failed to do so. The plaintiff then brought this suit against the defendant company for the value of the motor car.

The defendant company did not seriously dispute the theft but resisted the claim in paragraph 4 of its statement of defence on the ground that the plaintiff in his proposal form Exhibit P.1 had made a declaration false in several aspects, namely as follows: —

1) In answer to question No. 6(A) in the proposal form:

"Have you ever made a claim under any motor vehicle policy?", the plaintiff answered in the negative.

(2) In answer to question 6(B):

"Are you now or have been insured in respect of any other motor vehicle?"

the answer given was in the affirmative and the name of the company given was: "Commercial Union Insurance Co. Ltd."

In his reply to the defence above, the plaintiff in his pleadings averred as follows: —

"(2) As regards to paragraph 4 of the statement of defence the plaintiff avers that he informed the defendant's agents that he had made claims before but the said agents said that as the claims were more than 3 years prior to the proposal there was no necessity to disclose them in the proposal form, for reason, so said the agents, that the plaintiff was entitled to the no claim bonus, if no claim had been made prior to three years.

As regards paragraph (b) of the particulars, the plaintiff avers that the defendant's agents explained to him that the relevant question was only in respect of insurance with other companies."

The plaintiff gave evidence. In his evidence he explained how the answers to the questions 6(A) and 6(B) in the proposal form were made. According to him Mr. Hoe Kon Thut, then part-time agent of the defendant company assisted him in filling up the form and in the course of that Mr. Hoe explained to the plaintiff that in reference to question 6(A), that the plaintiff was only to concern himself with any claim made within the last three years and that it was not necessary to refer to the two previous claims made by plaintiff against the defendant company about 6 years previously. That was the reason why the negative answer was given to the question 6(A). With regard to question 6(B) the plaintiff stated that he did not tell Mr. Hoe to put in the name of the defendant company because he left the matter entirely to Mr. Hoe. Besides he was not able to read or speak English.

Mr. Hoe gave evidence for the plaintiff. He corroborated the evidence of the plaintiff as to what happened at the time when the form was being filled up. He, however, went further to state that before the proposal form was completed he spoke to Mr. Lee, D.W.1, alone in his office and told him of the previous claims made by the plaintiff. Mr. Lee then said it would be in order to enter the answer "No" to the question 6(A) as the claims had been made so long ago but would impose an excess clause of $600 instead of the usual sum of between $200 and $300. He was questioned by the court on this matter and his reply was as follows:

"Normally the excess clause would be between $200 and $300. This compulsory excess of $600 imposed by the defendants was high but it was because I had explained about two previous claims."

Mr. Lee, D.W.1, the manager of the defendant company in his evidence, denied that Mr. Hoe saw him about the proposal form in this case and also denied that he had said that the negative answer to question 6(A) would be in order since the previous claims were made a long time previously or that in the circumstances he decided to impose an excess clause of $600. He went on to say further that as a matter of fact he had imposed a similar excess clause in reference to another policy marked Exhibit D.4.

Mr. Lee was questioned by the court at some length as to his practice in considering the amount of excess claim or "no claim" bonus in previous cases. He agreed with the learned judge that the usual excess clause would be imposed where the proposer had not made a previous claim within the period of two or three years. There was a note made by the learned judge to the effect that Mr. Lee was evasive and refused to answer certain questions put to him by the judge. It was apparent that the learned judge was not impressed with the evidence of Mr. Lee.

The learned judge decided the case on the basis that the answers to the questions 6(A) and 6(B) were not material. To quote his own words:

"I find that the plaintiff had made due disclosure and the answers given were as advised by the company's agent Mr. Hoe, and if untrue, knowledge of the true facts would be imputed to the company as Mr. Hoe had transacted business with plaintiff on the company's behalf in the past and not only in this case. I further hold that the answers given were not material."

It would be apparent from the above therefore, that the learned judge believed both the evidence of the plaintiff and Mr. Hoe to the effect that the plaintiff reminded Mr. Hoe of his previous two claims and that when the answer "No" was entered for question 6(A) they had in mind only of previous claims made within three years before September 1967, and that he had imputed that knowledge of Mr. Hoe to the company on the ground that all dealings by the plaintiff with the company had been done through Mr. Hoe himself. The learned judge restated this view later in his judgment:

"To Mr. Lee and the company must further be imputed the knowledge of Mr. Hoe and his advice as to what the answers should be and made him in part an agent of the company as well as of the plaintiff."

The learned judge then went on to say that on the above grounds he came to the conclusion that the answers to the questions were not material since Mr. Lee's mind was not affected by it and found support from the following passage in the judgment of MacKinnon L.J. in *Zurich General Accident and Liability Insurance Co.* v. *Morrison & Ors.*[1]: —

"Under the general law of insurance an insurer can avoid a policy if he proves that there has been misrepresentation or concealment of a material fact by the assured. What is material is that which would influence the mind of a prudent insurer in deciding whether to accept the risk or fix the premium, and if this be proved it is not necessary further to prove that the mind of the actual insurer was so affected. In other words, the assured could not rebut the claim to avoid the policy because of a material representation by a plea that the particular insurer concerned was so stupid, ignorant, or reckless, that he could not exercise the judgment of a prudent insurer and was in fact unaffected by anything the assured had represented or concealed. But under the provisions of the Road Traffic Act, 1934, I think this general rule of insurance law is modified. The section requires the insurer to establish that the policy was 'obtained' by non-disclosure or misrepresentation.

In such a case as this, therefore, I think the plaintiffs must establish two propositions: (1) that the matter relied on was 'material' in the sense that the mind of a prudent insurer would be affected by it, and (2) that in fact their underwriter's mind was so affected, and the policy was thereby obtained.

The learned judge was not satisfied that the plaintiffs had established either of these propositions, and I agree with him."

Before us, however, it was argued that the learned judge was wrong in considering the evidence of Mr. Hoe to explain how the answers to the questions 6(A) and (B) were put in, because that would be allowing oral evidence to contradict a written one. Sections 91 and 92 of the Evidence Ordinance of 1950 and the English case of *Newsholme Bros.* v. *Road Transport and General Insurance Co. Ltd.*[2] were cited to us. In that case a proposal form was handed by an agent of the insurance company to a partner in the plaintiff firm who was minded to insure a motor omnibus, the property of the partnership, against damage by accident and third party risks. In answer to three of the questions set out in the proposal form the partner gave correct answers orally to the agent but the agent wrote those answers in the form incorrectly either because he misunderstood or forgot what the partner had told him or intentionally to earn a commission which otherwise he would not receive. The partner then signed the form which contained a warranty that the answers were true and the statement that the warranty was promissory and should be the basis of the contract between insurers and assured. The company issued a policy and accepted a premium. An accident having occurred, the plaintiffs claimed to be indemnified under their policy, but the company repudiated the claim on the ground that the written proposal contained untrue statements. The Court of Appeal held that the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer, and knowledge of the agent that the answers to certain questions in the form were not true was not notice to the company; the written contract alone could be looked at to ascertain the terms of the agreement between the parties; and, therefore, the company was not liable to meet the plaintiff's claim.

In a judgment of Greer L.J. at page 379 on the question of whether oral evidence may be adduced to contradict a contract in writing the Lord Justice cited a passage from *Salmond and Winfield's* Principles of the Law of Contracts (1927) at pages 103, 104:

"Such being the nature of a written contract, I proceed to the consideration of a fundamental legal principle which applies to all such contracts, and distinguishes them from all others. This principle may be thus formulated: In the case of a contract in writing, the written instrument is exclusive and conclusive evidence of the terms of the contract. It is exclusive evidence and therefore no other and substituted evidence is admissible as to what these terms are.... A written contract is what the written instrument says it is: nothing more nothing less, and nothing different."

The Lord Justice then continues with the following: —

"The paragraph concludes by this citation from Denman C.J. in *Goss* v. *Lord Nugent* (1833) 5 B & Ad. 58:

'If there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify, the written contract'."

In the instant case it was urged on behalf of the defendant company before us that the questions and answers in the form formed part of the contract. This would be apparent from the following condition 9 printed on the policy:

"The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

Sections 91 and 92 of the Evidence Ordinance 1950 provide that where the terms of any contract have been reduced to the form of a document, no evidence of any oral agreement or statement shall be admitted as between the parties to any such contract or their representatives-in-interest for the purpose of contradicting, varying, adding to or subtracting from its terms, unless the matter can be brought under any of the provisoes to section 92.

In my view, by reason of condition 9 the truth of the statements and answers to questions 6(A) and (B) in the proposal form have become terms of the contract and by reason of sections 91 and 92 of the Evidence Ordinance it was not open to the plaintiff to make use of the evidence of Mr. Hoe to contradict or vary or add to or subtract from them.

If I am right on the question of law that the evidence of Mr. Hoe is irrelevant, it would follow therefore that the plaintiff's case would fail.

On the other hand, if I should be wrong there, then the next question is whether the learned judge was right in deciding that the answers to questions 6(A) and (B) are immaterial, on the ground that they had not affected the mind of Mr. Lee as a prudent insurer. In coming to the conclusion that the answers to the said question were immaterial the learned judge also held that the knowledge of Mr. Hoe as to the circumstances should be imputed to Mr. Lee and the company.

Before us it was argued for the appellant that when Mr. Hoe was helping the plaintiff to fill up the proposal form he was merely acting as the agent of the plaintiff and not the company. In *Biggar* v. *Rock Life Assurance Co.*[3] the proposal form was filled by

the agent, many of the answers filled in by him being false in material aspects, but the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained a declaration that the applicant agreed that the statements in the proposal should form the basis of the truthfulness of the statements in the proposal. It was held that in filling up the answers in the proposal form the agent was acting as the agent of the applicant.

In the *Newsholme Bros.* case, *supra*, at page 373 Scrutton J. dealing on the facts of that particular case said:

"In my view, the important question for the decision of this case is whether the knowledge of the agent, acquired in filling up the proposal for the assured, is to be taken as the knowledge of the company. If the person having authority to bind the company by making a contract in fact knows of the untruth of the statements and yet takes the premium, the question may be different. Even then I see great difficulty in avoiding the effect of the writing signed by the proposer that the truth of the statements is the basis of the contract. But where the person contracting for the company has no knowledge but only constructive notice, the difficulties of the proposer are greater. In commercial matters, the doctrine of constructive notice is not favoured; See the explanation by Lindley L.J. in *Manchester Trust* v. *Furness* [1895] 2 Q.B. 539, 545...."

Further down in the judgment of his Lordship at page 374 he said this: —

"Another objection to this imputation of constructive knowledge may be found in the recent decision of the House of Lords, in *Houghton's* case [1928] A.C. 1, 18, 19, where Lord Sumner points out that where knowledge is to be imputed to an artificial person, in the first place it must be the knowledge of the directors who deal with the company's rights, and, in the second place, the knowledge of a person who acquires it in a breach of duty, and is guilty of a breach of duty in respect to it, is not to be imputed to a company to whom, from the hypothesis, he would be very unlikely to disclose it in fact."

Assuming, however, the learned judge was right, though I feel considerable doubt about it, that Mr. Hoe was acting also as the agent of the defendant company in filling up the proposal form for the plaintiff, and that the knowledge of Mr. Hoe in these circumstances could be imputed to Mr. Lee and the company, there is still in my view, the further question whether the learned judge could consider the question as to whether the answers to these questions were material or not. In my view he could not, because the truth of the answers had been made a condition of the policy and in coming to that conclusion I find support from the following authorities:

In *Dawsons Ltd.* v. *Bonnin & Ors.*[4] Viscount Haldane at page 94 said:

"Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition, exact fulfilment of which is rendered by stipulation foundational to its enforceability."

Again, Viscount Cave in his judgment at page 97 said:

"Lord Esher, M.R. in *Hambrough* v. *Mutual Life Insurance Co. of New York* (72 L.T. at page 141), uses the word 'basis' in the same sense. Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered."

His Lordship explained further at page 98:

"As Lord Sumner said in *Yorkshire Insurance Co.* v. *Campbell* [1917] A.C. at page 225.... 'since the parties have imported this statement into their contract presumably they thought it material.' This is certainly not less true when they have agreed that the statement shall be the basis of the contract. In these circumstances, it appears to me to be irrelevant to consider the conflicting evidence in the case as to whether a misstatement as to the place of garage is, in the ordinary sense, material or not. The parties have agreed that it shall be deemed material and that concludes the matter."

In my view, therefore, once it is established that the truth of the answers in questions 6(A) and (B) is a condition of the contract, it is not open to the judge to consider the question of its materiality. I would therefore allow the appeal and set aside the judgment of the court below. The respondent must pay the costs of this appeal and the costs in the court below. The appellant's deposit of $500 be returned to them.

Suffian F.J.: With respect I do not agree. I am of the opinion that the insurers cannot repudiate the policy in these circumstances and that therefore this appeal should be dismissed.

First, it is said by Mr. Lim Kean Siew on behalf of the insurance company that the learned judge's main ground against them was based on an issue of fact not raised by the plaintiff's pleadings. In my view, the evidence led by the plaintiff showing that he had told Mr. Hoe the truth and that Mr. Hoe had passed it on to Mr. Lee, the insurers' Penang manager, was permitted by the pleadings, since the plaintiff in his reply said that he informed the defendants' agents that he had made claims before, but the agents told him that, as the claims had been made more than three years prior to the proposal, there was no need to disclose them because the plaintiff was entitled to a no-claim bonus if no claim had been made for more than three years. In his reply the plaintiff also said that the defendants' agents had explained to him that question 6(B) related only to insuring with other insurance companies.

The plaintiff did not in his reply name the defendants' agents, but it was unnecessary for him to do so. Mere mention of these agents should have put the defendant company on the alert.

It is next said by Mr. Lim Kean Siew that the written statements in the proposal form and in the policy are clear, they form the basis of the contract and cannot be contradicted by oral evidence. It is said that the plaintiff, having answered "No" to the question "Have you ever made a claim under any motor vehicle policy?", no evidence may be allowed to contradict this statement. Mr. Lim relies on sections 91 and 92 of the Evidence Ordinance and cites from *Newsholme Brothers*[2] a passage from the judgment of Greer L.J. at page 453:

"... Once a contract is reduced into writing the writing alone can be looked at as containing the terms of the contract. Anything said during the negotiations ceases to have any legal validity. The contract, and the contract alone, can be look-

ed at in order to determine the rights of the parties.... In the present case, therefore, it does not seem to matter whether the verbal statements which are relied upon are made to a person in the position of Mr. Willey or are made to the directors of the company. In either case, they could not affect the contract which is wholly contained in the policy of insurance with its incorporated proposal form."

What happened in that case was that a proposal form was handed by Mr. Willey, the agent of the insurance company, to a partner in the plaintiff firm who was minded to insure a bus, the property of the partnership, against damage by accident and third-party risk. In answer to three of the questions set out in the proposal form, the partner gave the correct answers to the agent orally, but the agent wrote those answers in the form incorrectly. The partner then signed the form which contained a warranty that the answers were true and a statement that the warranty should be the basis of the contract between insurers and assured. The company issued a policy and accepted a premium. An accident having occurred, the plaintiff claimed to be indemnified under the policy, but the company repudiated the claim on the ground that the written proposal contained untrue statements. It was held by the English Court of Appeal that the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer, and knowledge of the agent that the answers to certain questions on the form were not true, was not notice to the company; the written contract alone could be looked at to ascertain the terms of the agreement between the parties; and, therefore, the company was not liable to meet the plaintiff's claim.

I am of the opinion that Mr. Lim Kean Siew's argument cannot succeed. Section 91 of the Evidence Ordinance provides —

"When the terms of a contract... have been reduced by... the parties to the form of a document... no evidence shall be given in proof of the terms of such contract... except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Section 92 provides:

"When the terms of any such contract... have been proved according to section 91 of this Ordinance, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument... for the purpose of contradicting, varying, adding to, or subtracting from its terms ..."

The plaintiff in the instant case admits *in toto* the *terms* of the proposal form and the policy, and accordingly there is no question of contradicting, varying, adding to, or subtracting from its terms; all he tried to do was to contradict the written *answers* on the proposal form. For this reason, in my judgment sections 91 and 92 have no application.

Nor can the case of *Newsholme Brothers* have any application. There the insurers' agent, Mr. Willey, kept to himself the information supplied by the assured to him; he did *not* pass it on to the insurance company. In contrast, here the proposal form was filled in by Mr. Hoe on the plaintiff's behalf, in close collaboration with Mr. Lee, the insurance company's manager, and indeed there was a firm factual finding by the judge that all along Mr. Lee knew that the plaintiff had previously been insured with his firm, and had made two claims under that policy, and in recognition of the greater risk involved Mr. Lee had imposed an excess of three times the usual amount.

It is next said that when Mr. Hoe filled in the proposal form he was acting not on behalf of the defendant company but on behalf of the plaintiff. Counsel relies on *Biggar* v. *Rock Life Assurance Co.*[3] The headnote of that case reads as follows:

"A policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal from without reading it. The proposal contained a declaration in which the applicant agreed that the statements in the proposal should form the basis of the policy, and the policy contained a proviso that it was granted on the express condition of the truthfulness of the statements in the proposal. Shortly after payment of the premium the insured was accidentally injured:-

Held, first, that it was the duty of the [assured] to read the answers in the proposal before signing it, and that he must be taken to have read and adopted them; and, secondly, that in filling in the false answers in the proposal the agent was acting, not as the agent of the insurance company, but as the agent of the applicant; and that therefore the policy was void."

Counsel also relies on *Newsholme Bros.* v. *Road Transport and General Insurance Co., Ltd.*,[2] a decision of the Court of Appeal, where Scrutton, L.J. said at page 415:

"... If the answers are untrue and he [an insurance company's agent who helps the assured to fill in a proposal form] knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are unture but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company. In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

I am of the opinion that this instant case can be distinguished from the above two cases in this way: in the instant case there was close consultation between Mr. Hoe on the one hand and Mr. Lee, the defendant company's manager, on the other, at the actual time when the form was being filled in. Consequently, in my view, while in the ordinary run of cases where a proposal form is filled in by the agent in consultation with the prospective client, in the absence of the insurance company's manager who subsequently receives the proposal form already filled in and signed without being told of what has transpired between the agent and the prospective client, the agent is the agent of the prospective client, here on the other hand, because of the close consultation between Mr. Hoe and Mr. Lee at the time when the form was being filled it was quite proper for the learned trial judge to find, as he did, that in fact Mr. Hoe was also the company's agent, and that accordingly Mr. Hoe's knowledge can be imputed to the company.

It is next said that the learned judge was wrong in holding that the answers given by the plaintiff in

the proposal form were not material, since the question of materiality is only to be decided by the court, if it has not been agreed by the parties and set out in the contract. Mr. Lim Kean Siew cites five cases in support:

(1) *Joel* v. *Law Union and Crown Insurance Co.*;[5]

(2) *Locker and Woolf Ltd.* v. *Western Australian Insurance Co.*;[6]

(3) *Condogianis* v. *Guardian Assurance Co., Ltd.*;[7]

(4) *Glicksman* v. *Lancanshire & General Assurance Co.*;[8] and

(5) *Dawsons Ltd.* v. *Bonnin.*[4]

From the third case, a Privy Council decision, Mr. Lim Kean Siew cites the following passage from the opinion of their Lordships at page 129:

"... the parties having settled for themselves by making the fact the basis of the contract, and giving a warranty — that as between them their agreement on that subject precluded all inquiry in the issue of materiality..."

From the fourth case, Mr. Lim cites the following passage at page 163 from Viscount Dunedin's judgment:

"A contract of insurance is denominated a contract *uberrimae fidei*. It is possible for persons to stipulate that answers to certain questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions."

I have no doubt that once parties to a policy agree that something should be the basis of their contract, it is not open to the court to consider the question of materiality. But I am of the view that Mr. Lim's argument cannot succeed. Though the learned judge used the word "material" several times in his judgment, and towards the end he categorically stated that the plaintiff's answers to the questions were not, in his opinion, material, I think that what he meant by this was that the untrue answers would have been material had Mr. Hoe kept them to himself and not passed them on to Mr. Lee, but that as he did pass them on to Mr. Lee and Mr. Lee was aware of the truth of the matter and nevertheless advised the plaintiff through Mr. Hoe to answer question 6 as he did, the untruthfulness of the written answers in fact made no difference to Mr. Lee on the question whether or not he should accept on behalf of his employers the risk of insuring the plaintiff's car. He did accept the risk, and in recognition of the plaintiff's previous two claims he upped the excess from the usual $200 to $600. In none of the cases cited to us was there this unique feature of the instant case, that the insurers' agent who helped fill in the proposal form and wrote down false answers did in fact pass on the truth to the manager of the insurance company.

I find some support for my view in another judgment of the English Court of Appeal, not cited to us, in *Barrett Bros. (Taxis) Ltd.* v. *Davies.*[9] There a motor-cyclist was insured against third party risks. By condition 1 of the policy he agreed to give the insurers full particulars as soon as possible after any accident and to forward immediately any notice of intended prosecution. He had an accident damaging a taxi. He did not at once tell the insurers about the accident, but the solicitors for the taxi driver did. Also, he did not forward to the insurers a notice of intended prosecution received from the police, but the police told the insurers about it. He was held liable for the damage to the taxi. On the question whether the insurers should pay for this damage, they claimed that they were not liable because the motor-cyclist had been in breach of condition 1. The county court judge agreed with them, but on appeal it was held by the Court of Appeal that they were liable.

Lord Denning M.R. said at page 1339:

"...it was unnecessary for the motor-cyclist to send the [notice of intended prosecution] to the insurers. They had all the relevant facts, and that absolved the motor-cyclist from doing more... Seeing that they had received the information from the police, it would be a futile thing to require the motor-cyclist himself to give them the self-same information. The law never compels a person to do that which is useless and unnecessary."

At page 1340 His Lordship said:

"This condition 1 was inserted in the policy so as to afford a protection to the insurers so that they should know in good time about the accident and any proceedings consequent on it. If they obtain all the material knowledge from another source so that they are not prejudiced at all by the failure of the insured himself to tell him, then they cannot rely on the condition to defeat the claim."

In the instant case too the relevant conditions were inserted to afford a protection to the insurers so that they would have all the necessary information to decide whether or not to accept the risk and if so on what terms. Despite what was written in English on the proposal form on behalf of a client who is literate only in Chinese, the insurers through their manager Mr. Lee did obtain all the knowledge material for their purpose, so that in reality they were not prejudiced at all by the failure of the client to answer truthfully in writing in a language foreign to him the questions on the form.

I would therefore dismiss this appeal.

Ali F.J.: The main question in this appeal is one of law. It involves the consideration whether or not the appellant, China Insurance Company, Limited, is entitled to avoid liability under the policy of insurance No. P/MC 57190 issued to the respondent on September 19, 1967. So far as this is dependent on the existence of certain facts, those which are not in dispute may be stated as follows: —

By a proposal form dated September 2, 1967, the respondent, Ngau Ah Kau alias Ngau Boon Hee, applied for a comprehensive insurance policy in respect of his car, a Volvo make. The proposal form contained answers to various questions and at the foot of this form the respondent signed a declaration in these terms:

"I/We declare the above statements and particulars to be true and correct and agree that they shall be the basis of the contract between the company and myself (ourselves)".

Subsequent to this, the said policy of insurance was issued. It was subject to an excess clause of $600 which means that for any claim exceeding $600 the company would only be liable for the excess. On September 29, *i.e.* 10 days after the date of the policy, the car was reported stolen. That this was a risk covered by the policy was never in doubt. Upon the

respondent making a claim for indemnity, the appellant carried out the usual enquiry and discovered that the answer or answers to some of the questions in the proposal form were untrue. There was a finding that one of the answers, at least, was clearly untrue. It was in respect of the question whether or not the respondent has ever made any insurance claim before the date of his proposal or application. His answer was a "No" when in fact he had made two such claims in 1961. This was mainly relied upon by the appellant as a material misstatement sufficient to entitle them to avoid liability. On their repudiation of liability, the respondent brought an action to enforce the policy.

On the evidence before him, the learned trial judge concluded that in the circumstances of the case the misstatement was not material and held the appellant liable under the policy. This conclusion was based on a conflict of evidence as to what happened when the proposal form was completed and before the policy was issued. For the respondent. the evidence was that the insurance agent, Mr. Hoe Kon Thut had been informed of the two claims in 1961 but the agent had advised to give the answer "No". He was so advised because it would entitle him to a no claim bonus, which means that there would be a rebate on the premium on the policy being renewed. Another explanation given was that the two claims were more than 3 years old and as such would make no difference to the respondent's entitlement to the no claim bonus. I need only ask that if it be so why the true answer "Yes" was not given. However, the agent, Mr. Hoe, confirmed all that the respondent said and added that he approached Mr. Lee Cheong Khim, the business manager, and informed him of the matter. He further stated that Mr. Lee had agreed to the issue of the policy notwithstanding the misstatement in the proposal form. He so agreed, it seems, because he was going to impose the excess clause of $600. Mr. Lee, as witness for the defence denied Mr. Hoe's allegations. On this conflict of evidence the trial judge accepted Mr. Hoe's evidence and arrived at the view that Mr. Lee had knowledge of the misstatement and imputed such knowledge to the appellant. Thereupon he held that the misstatement was not such a material misstatement which could influence the appellant in accepting the risk when issuing the policy. On that ground alone, it seems, judgment was entered against the appellant.

Upon a careful perusal of the record it would seem to me that the materiality question was not the only question raised by the defence. In paragraph 5 of the defence statement liability was also denied on the ground that by reason of the basis clause in the contract any misstatement in the proposal form would render the contract void. From the notes of argument counsel for the defence was recorded as having submitted that where parties have stipulated that answers to questions in the proposal form are to be the basis of the contract then if the answers are not true the contract is void. The case of *Condogianis* v. *Guardian Assurance Company Limited*[7] was referred to in support of the contention. This question was not fully argued at the trial and was therefore not considered by the learned trial judge. It has again been raised in this appeal and I think in view of its importance it must be considered.

In the course of argument counsel for the appellant has also raised the question relating to the admissibility of the oral evidence as to what happened when the proposal form was being completed and before the policy was issued. Sections 91 and 92 of the Evidence Ordinance were discussed. The oral evidence complained of was given by the respondent mainly for the purpose of showing that the incorrect or untrue answer in the proposal form was not material to the issue of the policy. The learned Lord President has dealt with this point in his judgment and I shall only be content to say that I am inclined to agree with his view.

In this judgment I shall only confine myself to the consideration of the question which was not considered by the learned trial judge. The question is whether, in view of the declaration made by the respondent in the proposal form that the truth or correctness of the answers and particulars therein were to be the basis of the contract, any misstatement, material or otherwise, would render the contract void. The principle was stated by Lord Blackburn in *Thomson* v. *Weems*[10] as follows (at page 683):

"It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing "is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material."

In *Dawsons, Ltd.* v. *Bonnin & Ors.*[4] this passage from Lord Blackburn's judgment was quoted with approval. Admittedly, the judgment in *Dawsons'* case was a majority judgment but the correctness of the principle stated by Lord Blackburn was never in doubt.

In *Dawsons, Ltd.* v. *Bonnin & Ors., supra,* the claim was for the loss of the insured lorry by fire. There was a misstatement in the proposal form relating to the address of the garage for the lorry. As in the instant case there was also a declaration in the proposal form that the truthfulness of all the answers was to be the basis of the contract. Likewise the declaration was incorporated in the policy. Viscount Haldane said on page 94:

"...Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability."

On page 97 Viscount Cave said to the same effect as follows:

"...Upon the whole, it appears to me, both on principle and on authority, that the meaning and effect of the 'basis' clause, taken by itself, is that any untrue statement in the proposal, or any breach of its promissory clauses, shall avoid the policy; and if that be the contract of the parties it is fully established, by decisions of your Lordships' House, that the question of materiality has not to be considered."

(The underlining is mine)

Lord Dunedin, also in the majority, agreed with Viscount Cave. Viscount Finlay and Lord Wrenbury who were in the minority took the view that by reason of the fourth condition in the policy the misstatement would not be material to render the policy void. The fourth condition of the policy in *Dawsons'* case, *supra,* was in these terms:

"Material misstatement or concealment of any circumstance by the insured material to assessing the premium herein, or connection with any claim, shall render the policy void."

Fortunately in our case there is no condition similar to the fourth condition which influenced the minority judgment in *Dawsons'* case. On the other hand, condition 9 of the policy in the instant case makes it abundantly clear that the truth of the statements and the answers in the proposal form is a condition precedent to any liability of the appellant company to make any payment under the policy. The condition reads:

"9. The due observance and fulfilment of the Terms of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Company to make any payment under this Policy."

The principle which was applied in *Dawsons'* case *supra,* in my respectful opinion, must likewise apply to the present case. In *Newsholme Brothers* v. *Road Transport and General Insurance Company, Limited*[2] Scrutton, L.J. had the same principle in mind when he said on page 376 this:

"... In any case, I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true, "and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

Applying the principle to this case as I do, I cannot escape the conclusion that this appeal must be allowed. Needless to say that I have come to this view with some reluctance and in the words of Viscount Cave that although one would have little sympathy with an insurance company who are seeking to profit by mistake contributed by their agent the case has to be decided according to law and the law happens to be on their side.

Accordingly I agree with the learned Lord President that this appeal be allowed with costs here and below.

Appeal allowed.

Solicitors: *Triptipal Singh & Co.; Lim Ewe Hock.*

RE MAMAT BIN DAT SAN & ANOR.; MEK SOM v. AWANG BIN SENIK

[F.C. (Suffian, Ali and H.S. Ong F.JJ.) October 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 89 of 1970]

Small Estates — Distribution — Consent order — Distribution with consent of beneficiaries — Consent of unsound mind beneficiary given by guardian — Small Estates (Distribution) Ordinance, 1955, ss. 10 and 15.

The plaintiffs applied to the court for a declaration that the order of distribution of an estate made by the Collector of Land Revenue was null and void. It was alleged that a share in the estate was given to a non-beneficiary. It appeared that all the beneficiaries had consented to the order of distribution, the consent of one of the beneficiaries who was of unsound mind having been given by his guardian appointed by the collector.

Held, dismissing the appeal: as the order of distribution had been made by consent it was binding on the beneficiaries.

Case referred to:-

(1) *Wilding* v. *Sanderson* [1897] 2 Ch. 534 at p. 543.

FEDERAL COURT.

H. L. Wrigglesworth for the appellants.

Dato' Isahak bin Abdul Hamid for the respondent.

In the court below *N. Chan* and *Phillip Leong* appeared for the plaintiffs, and *Dato' Isahak bin Abdul Hamid* for the defendant. The following grounds of judgment were delivered on August 5, 1970:

Ibrahim J.: In this action the plaintiffs were asking the court for a declaration that the order of distribution of the collector of Pasir Mas in Distribution Suit No. 102 of 1950 dated 18th May 1957 in respect of Lot 119 Mukim Rantau Panjang, District of Pasir Mas (now known as Lots 223 and 224 held under grant No. 8452) was null and void and to set aside the said order.

The statement of claim was amended several times and as finally amended paragraph (11) thereof on which ultimately the action was solely based reads as follows:

"(11) The Collector of Pasir Mas acted *ultra vires* when he ordered on 18th May, 1957 that the ½ undivided share in the said land be distributed among Awang bin Senik, Samat bin Che Omar and Mek Som binti Bulat equally, when Awang bin Senik was not a beneficiary of the estate of Mamat bin Dat San."

The defendant had contended that since the plaintiffs had a right of appeal under section 29 of the Small Estates (Distribution) Ordinance No. 34 of 1955 and they had not exercised that right they were precluded from bringing this action. As it was the defendant's case all along that the collector's order of distribution was made with the agreement and assent of all the beneficiaries and was therefore a consent order it would not be necessary for me to deal with this matter at great length. I did not agree with the defendant's contention and would in this connection cite the judgment of Byrne J. in *Wilding* v. *Sanderson*[1] where his Lordship in reference to a consent judgment or order said: —

"It must, when once it has been completed, be obeyed, unless and until he can get it set aside in proceedings duly constituted for the purpose."